No. 1148

MAY 7 1942

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

OCCIDENTAL LIFE INSURANCE COMPANY, a Corporation,
Petitioner,

vs.

SOPHIE EILER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

The opinion and points of decision of the Circuit Court of Appeals for the Eighth Circuit are reported in 125 Fed. (2nd) 229, and set forth on pages 196 to 210 of the record filed herein.

The respondent's pleadings (petition and reply) are predicated on the fact that the insured was insane at and prior to his death by suicide; that the acceptance by the respondent of the $1,500 paid by the petitioner constituted but a partial payment on the $5,000 accidental death benefit due under the policy, and that the purported release

taken by the petitioner was void for lack of consideration as the amount involved was fixed and no bona fide controversy existed (R. 6-9, 20-26).

The respondent's evidence (the **only** evidence presented touching on the insured's mental condition) consisted partially of the testimony of three psychiatrists who had treated the insured over a period of years, and showed without qualification that the insured was insane at the time of his death and had been continuously for several years prior thereto (R. 100-130); that no hospitalization would have helped him (R. 103); that no special therapy could have reached his condition, and no treatment could have restored him to mental health or sound mind (R. 104). These psychiatrists, in answer to hypothetical questions which, aside from their examinations and treatment of the insured, took into consideration the insured's strange and unusual conduct, as shown by other evidence, and the rambling note introduced in evidence by the respondent (which note until that moment was wholly unknown to the petitioner), expressed opinions that the insured was insane at the time of his death (R. 105-110, 119-124, 128-130). The respondent and other lay witnesses testified to the delusions and hallucinations of the insured and other weird actions and conduct on his part (R. 42-44, 72-77, 89-92, 95-97, 98-100); that two of insured's sisters had been confined to a Missouri State Insane Asylum (R. 92, 93); and that the insured himself had been confined to the same hospital for the insane as well as another psychopathic hospital (R. 73).

The evidence further disclosed that, following the insured's death, the respondent requested of the petitioner, through its agent, the double indemnity benefit due under the policy and advised said agent that the insured was nervous and had been in mental hospitals, and was mentally deranged, but the agent stated that double indemnity

was not paid "in suicide and mental cases" (R. 51-56, 78, 79). On a subsequent occasion respondent again requested payment of the accidental death benefit under the policy and again told the petitioner's agent about the insured's mental derangement and that the insured had been confined to hospitals for the insane, and invited the agent to verify her statements (R. 52, 79). Petitioner had been furnished with proofs of death and a coroner's certificate immediately following the insured's death, which showed that the insured came to his death from a gunshot wound, self-inflicted, and that he was known to have been mentally deranged for two years or more. These forms of proof and coroner's certificate were furnished respondent by the petitioner's agent, returned to and approved by said agent, and forwarded to petitioner's home office (R. 169, 170, 172-174, 46, 78, 142). When respondent for the second time advised the petitioner's agent of the insured's insanity and again requested payment of the double indemnity benefit, the agent phoned the petitioner's home office and advised it of the statements and demand made (R. 54, 55, 80, 149). Petitioner thereafter paid $1,500, stating that the company did not owe respondent anything but was just giving her the money to get the matter straightened out before consolidation of the two companies took place (R. 53, 80).

The petitioner's sole witness was its agent, who **admitted** that the respondent told him about the unbalanced condition of the insured's mind when she requested the double indemnity, and told him that the insured was nervous, unbalanced and insane (R. 148, 161, 162). He told the respondent that the company did not pay double indemnity for accidental death, or for self-inflicted death, or for suicide (R. 147). He made no investigation or otherwise concerned himself about the insured's insanity, contending that it was none of his business (R. 162):

"Q. If this matter came to your attention that Mr. Eiler was insane, you knew, of course, he committed suicide also, did you not? A. Yes.

Q. Your answer is 'yes,' so the record will be straight? A. Yes.

Q. Did you make any investigation, or do anything about it further than call the home office? A. I did not.

Q. Did you never make any inquiry to determine whether he was sane or insane? A. I did not. It was none of my business.

Q. Did you inquire about what doctors might have treated him or what hospitals he was in? A. I did not.

Q. In other words, after they told you of the insanity, you never concerned yourself to even find out whether it was true or not true? A. No, I was never delegated to do that."

The agent testified that it was his business to make out proofs of death and forward them to the company. He always saw the proofs of death furnished by the company (R. 142).

BRIEF.

I.

The opinion of the Circuit Court of Appeals for the Eighth Circuit in this cause, under the circumstances disclosed by the record, is completely in accordance with the law of the State of Missouri. The holdings of the courts in this state to the effect that payment of a part of an indebtedness, unquestionably due on a liquidated amount payable under an insurance policy, is no consideration for release of the balance; and that the payment of a part upon a dispute raised in bad faith without any reasonable ground therefor will avail nothing as a consideration for a release of the balance; and that a settlement paid to the beneficiary for a lesser amount and the release taken for said lesser amount is void; and that a party suing under such circumstances for the balance of the amount due, on the ground that the release was void, need not tender back the amount paid under the circumstances; is, we submit, so clearly the law that it is not even open to question. The cases cited by the Court of Appeals in its opinion, together with the additional authorities noted below, fully support this proposition.

Goodson et al., Resp., v. National Masonic Accident Assn., App., 91 Mo. App. 339;

Section 934, Revised Statutes of Missouri 1939 (Sec. 654, R. S. Mo. 1899).

II.

The evidence overwhelmingly showed the insured's accidental death by suicide while insane.

Rodgers v. Travelers Ins. Co., 311 Mo. 249, 278 S. W. 368.

III.

The refusal of petitioner to pay respondent the balance due her under the accidental death benefit of the policy was, under the facts in this case, vexatious, and the trial court properly assessed penalties under Section 6040, Revised Statutes of Missouri 1939 (R. S. Mo. 1929, Sec. 5929).

Section 6040, Revised Statutes of Missouri 1939;
Exchange Bank of Novinger v. Turner et al., 321 Mo. 1104, 14 S. W. (2d) 425;
Friedman v. State Mutual Life Ass. Co., 108 S. W. (2d) 156 (Mo. App.);
Clair et al. v. American Bankers Ass. Co., 137 S. W. (2d) 969 (Mo. App.).

IV.

The record and appeal proceedings in this case fully support the holding of the Court of Appeals that the petitioner's appeal from the judgment of the District Court was vexatious under the law of Missouri and the Court of Appeals was justified in awarding respondent damages for vexatious appeal in a sum not to exceed 10 per cent of the amount of the judgment complained of.

Revised Statutes of Missouri 1939, Section 1230;
Rule 31, Paragraph 2, U. S. C. A. (8th);
Bonzon v. Metropolitan Life Ins. Co. (Mo. App.), 143 S. W. (2d) 336;
Polski v. City of St. Louis et al. (Mo. Sup.), 175 S. W. 197, 264 Mo. 458;
Section 1230, Revised Statutes of Missouri 1939;
Rule 31, Par. 2, U. S. C. A. 8th.

ARGUMENT.

I.

The undisputed evidence in this case showed that the insured, at and for several years prior to his death, was hopelessly insane; that he had been incarcerated in two institutions for the care of the insane; that he had been treated by at least three physicians specializing in nervous and mental diseases, who testified that he was continuously insane from the time of their treatment to the date of his death, suffering a condition which medical treatment could not alleviate; that two of his sisters were insane, one of whom committed suicide; that for a period of years the insured was doing unusual, peculiar and horrible things which could not have been classed as other than evidences of insanity, during which time he grew progressively worse and lost weight until he was nothing but skin and bones at the time of his death; that positive evidence of his insanity was furnished petitioner, not only in the proofs of death, but likewise by statements made by the respondent to the petitioner's agent, informing him that the insured was insane and had been treated and confined to institutions for the care of the insane, which information the petitioner's agent and sole representative in its dealings with respondent **admitted** was brought to his attention, but which he also **admitted** he did not investigate or otherwise concern himself about except to notify the home office of the respondent's claim that the insured was insane, and that respondent was requesting payment of the double indemnity benefit.

For the petitioner to suggest that the insured was not insane, in view of the weight of the evidence adduced on the point at trial, is nothing short of absurd, particularly when there was not one word of testimony offered by the petitioner, from lay or medical witnesses—documentary or

otherwise—tending to dispute in any degree the insured's insanity. Petitioner, although fully informed of the insured's insanity, refused to pay the respondent more than $1,500, stating that the company did not pay double indemnity for accidental death.

Nevertheless, in the face of this record, the petitioner contends that a bona fide controversy existed between the petitioner and respondent as to the insanity of the insured. It bottoms its argument on the premise (wholly unsupported by the evidence) that a dispute existed, and it attempts to argue that in refusing to pay the full accidental benefit it acted in good faith. It contends that a distinction exists between the cases cited by the Court of Appeals and the case at bar, in that the case at bar involves a suit on an accident policy and the burden of proof is on the respondent to prove that the insured's death was accidental, and that, until a finding was had showing the insured was insane, the petitioner was justified in presuming that he was sane, as a result of which there was created a doubt as to the petitioner's liability, sufficient to justify a compromise settlement of the liquidated sum involved. In disputing the respondent's request for payment of the accidental benefit under the policy the petitioner tries to say that it acted in good faith and had reasonable grounds for refusing payment.

Under the facts in evidence there **never was the slightest doubt** or question as to the insured's insanity at the time of his death. Not one word of evidence—documentary or otherwise—was produced by the petitioner to so much as indicate that the insured **might have been sane.** The only foundation on which petitioner bottoms its claim that a controversy existed was its refusal to pay and its barefaced claim that a dispute existed. A debtor cannot, by mere refusal to pay a claim, create a dispute sufficient for the purposes of accord and satisfaction (Friedman v. State Mutual Life Ins. Co., 108 S. W. [2d] 156 [Mo. App.]).

While a presumption of sanity may exist under ordinary circumstances, common sense dictates that it could not survive in the face of the type of evidence of the insured's insanity adduced in this record, which evidence of insanity was at all times known to the petitioner. Sanity is presumed only in the **absence** of evidence to the contrary (Brunswick v. Standard Accident Insurance Co., 278 Mo. 154, 213 S. W. 45). To contend otherwise would be utterly subversive of the well-established doctrine, figuratively but strikingly announced by Judge J. Lamm of the Missouri Supreme Court, substantially, to wit: That presumptions are the bats of the law, which the light of evidence frightens and causes to fly away (Mockowik v. Kansas City, St. Joe and C. B. R. Railroad, 196 Mo., l. c. 571).

The evidence disclosed that the insured was found with a bullet hole in his head in an upstairs room in his home with a rifle alongside his body. No one saw the rifle discharged. Under these circumstances, with no other evidence whatever appearing, the petitioner was liable under the accidental death benefit of the policy, the settled law of this state **presuming that he met his death from accidental means** (Andrus v. Business Men's Accident Assn. of America, 283 Mo. 442, 223 S. W. 70).

Petitioner, however, to avoid the effect of the cases cited by the Court of Appeals, contends that they do not involve an action on an accident policy and are therefore distinguishable from the case at bar. It further claims that there is no Missouri case involving an action on an accident policy, holding that a release is void where defendant denied insured's death was accidental. It claims that there is no Missouri case involving a suit on an accident policy holding that a return of the consideration paid to a beneficiary for a release was not required as a condition precedent to the right to maintain an action on the policy. The bases of several other claims made by it are predicated

on facts so different from those in the case at bar as to offer no analogy.

The case of Goodson et al., Resp., v. National Masonic Accident Assn., App., 91 Mo. App. 339, is a suit to recover the unpaid balance due on the **accidental death benefit provision** of a policy of insurance issued by the National Masonic **Accident** Association, arising out of the death of the insured from the **accidental discharge of a pistol** by him. The policy provided that:

> "Benefits in case of **death by accident** are payable to Eunice Graves (wife), if living; if not, to the legal heirs of said member; in all other cases to the member in person."

In this case the insuror, after the death of the insured, paid the widow the sum of $1,000 on a $5,000 face value policy of accident insurance, and took a release in settlement thereof. Thereafter, the widow, coming to believe that she was entitled to the balance due under the policy, in the sum of $4,000, assigned her interest in same for value received to the plaintiffs herein, who brought the suit. **The cause was tried by the Court without the aid of a jury**, and judgment rendered for the plaintiffs.

The Appellate Court, in affirming the judgment for plaintiffs, held that the $5,000 named in the face of the policy was a liquidated amount and that "where a beneficiary settles with the company for the death of her husband for a less sum than the policy called for and gives a receipt in full discharge of the policy, she does not, before suing for the balance, have to return the amount paid nor secure a setting aside of the release, but may, under the statute, try such issue as a part of the whole case."

In discussing this point the Court said (l. c. 351):

> "But whatever opinion my have formerly prevailed, it is now settled by the statute that a plea of fraudu-

lent or wrongful procurement of a release can be set up in plaintiff's reply and that that issue shall be tried by a jury with and as a part of the whole case and a general verdict returned. Section 654 R. S. 1899. . . .

"Defendant insists that when the payment of $1,000 was admitted that that was a consideration. We are not of that opinion. We have already seen that under the contract of insurance defendant owed Mrs. Graves the fixed sum of $5,000. This was a liquidated sum and could not be discharged by the smaller amount unless there was some consideration for it. To say that the payment of the less sum was the consideration, is to argue in a circle. . . .

"But the further insistence is, that when one is tendered a sum of money on condition that it be taken in full of the demand and he accepts the sum tendered, he also, ipso facto, accepts the condition. We so ruled in St. Joseph School Board v. Hull, 72 Mo. App. 403, but that rule presupposes **there is a dispute or disagreement in good faith** as to the amount of the demand. The rule has no application where a part of a claim is accepted under the mistaken view that it was the whole claim. That was this case. . . . Defendant said to her that it only owed her $1,000 and she, laboring under a mistake, thought defendant was right and took the money. Such facts leave no room for the application of the rule stated above." (Emphasis ours.)

The cases of Ock v. Railroad Company, 130 Mo. 27, 31 S. W. 962, and Reede v. Gill & Sons, 201 Mo. App. 457, 212 S. W. 43, cited by the petitioner, are not in point as they involve suits to recover damages for personal injuries and clearly demonstrate that the amounts sued for were not liquidated amounts, but rather unliquidated sums, and that there existed real controversies or disputes at the time the releases were entered into. In other words, those cases involved voidable releases, and not a **void** release, as is presented in the case at bar.

II.

Petitioner, in contending that the rambling note, presented in evidence by the respondent, establishes the insured's sanity, **entirely disregards the evidence** of the phychiatrists, who, in expressing their opinions that the insured was insane at the time of his death, took into consideration the note as well as the other evidence introduced, including their own examinations and findings. Aside from this, however, petitioner is estopped to claim that at the time the $1,500 was paid and the purported release taken, it knew, or had ever heard of the existence of the note. The note first came to the petitioner's attention when the respondent **voluntarily** introduced it in evidence at the trial.

The case of Gates v. Travelers Insurance Company, 218 S. W. 927 (Mo. App.), cited by the petitioner both in its specification of errors (2), and in its argument (II), as authority for establishing insured's sanity as a matter of law, has been overruled by the Supreme Court of Missouri in the case of Rodgers v. Travelers Insurance Company, 311 Mo. 249, 278 S. W. 368, where the Court said (l. c. 372):

> **"The Gates case should be and is overruled as being against the great weight of authority in the United States."**

III.

Under the circumstances disclosed in the record, in the case at bar, the trial court was justified in awarding respondent damages for vexatious delay under Revised Statutes of Missouri 1939, Section 6040.

Clair et al. v. American Bankers Assurance Co., 137 S. W. (2d) 969 (Mo. App.);

Exchange Bank of Novinger v. Turner et al., 321 Mo. 1104, 14 S. W. (2d) 425;

Friedman v. State Mutual Life Assurance Co., 108 S. W. (2d) 156 (Mo. App.).

IV.

The Court of Appeals was justified, after considering the record and appeal proceedings in this case, in awarding respondent damages in an amount equal to 10 per cent of the amount of the judgment, pursuant to Revised Statutes of Missouri 1939, Section 1230, and Rule 31, Par. 2, U. S. C. A. (8th).

Bonzon v. Metropolitan Life Ins. Co., 143 S. W. (2d) 336 (Mo. App.);
Polski v. City of St. Louis et al., 175 S. W. 197, 264 Mo. 458.

In citing the case of Polski v. City of St. Louis et al. (supra), the respondent desires to call the Court's attention to the fact that the petitioner raised for the first time in the Court of Appeals a point that had not been previously raised in the trial court, as an excuse to demand the reversal of the judgment. In the Polski case the Supreme Court of Missouri held:

> "Going outside the issues determined by the trial court for an excuse to demand the reversal of the judgment would seem to be prima facie evidence that the appeal is so frivolous as to justify the taxation of the penalty provided by Section 2084, Revised Statutes 1909" (Section 1230, R. S. Mo. 1939).

The Court of Appeals cited this case as one of several authorities for its holding that the petitioner's appeal was vexatious.

Respectfully submitted,

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